MCLE ON THE WEB ($15 PER CREDIT HOUR)
TEST #7
1 HOUR CREDIT
ELIMINATION OF BIAS

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Americans With Disabilities

The act extends an opportunity to compete on an equal basis and pursue the tenets of a free society

By Anne E. Garrett

Enacted in 1990, the federal Americans with Disabilities Act ("ADA" or "the Act") seeks to eliminate discrimination against individuals with mental and physical disabilities and to extend to them "the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. §§12101(a)(9) and (b)(1).

Hailed as landmark legislation by disability rights advocates, the ADA extended the basic mandate of the federal 1973 Rehabilitation Act (which applies only to federally funded programs and services) to private employers, state and local governments, and providers of public accommodation, transportation, and other public services. 42 U.S.C. §§12101 et seq.

The broad-sweeping Act has required both restructuring of entrances to restaurants and shops and the restructuring of the work day for employees with certain types of disabilities. This article focuses on the ADA's application to employment. It will outline the requirements of the ADA and briefly discuss some of the issues now being litigated before the courts.

Within the employment context, the ADA forbids any "covered entity" from discriminating "against a qualified individual with a disability" based on the individual's disability. Id. at §12112(a). "Covered entities" include any employer of 15 or more employees, unions, and employment agencies. Id. at §12111(2). The Act defines a "qualified individual" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position" at issue. Id. at §12111(8).

Much of the recent litigation under the Act concerns what constitutes a disability. Under the ADA, a disability means (a) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (b) "a record of such an impairment"; or (c) "being regarded as having such an impairment." Id. at §12102(2). The implementing regulations of the Equal Employment Opportunity Commission ("EEOC") further describe a physical or mental impairment as "(1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 CFR §1630.2(h).

While the Act specifically excludes a number of mental and physical impairments from disability status (i.e., transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal drug use), it is less clear which conditions are protected by the ADA. 29 CFR §1630.3(d).

In determining whether an impairment constitutes a disability, the courts ask whether any "major life activity" - including, but not limited to, "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" - is "substantially limited." 42 U.S.C. §12102(2)(A); 29 CFR §1630.2(i). The analysis essentially goes to whether an individual is either "[u]nable to perform a major life activity that the average person in the general population can perform" or is "[s]ignificantly restricted as to the condition, manner or duration" of performing a major life activity, in comparison to an average person. 29 CFR §1630.2 (j)(1)(i) and (ii).

Three factors should be used to determine whether or not an impairment substantially limits a major life activity: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact of the impairment. 29 CFR §1630.2(j)(2).

Many recent judicial decisions in this area focus on the threshold question of what constitutes a disability under the ADA. Particularly at issue is the extent to which an individual's ability to engage in the major life activity of working must be affected.

To prevent circularity of analysis (i.e., a complainant's disability existing ipso facto based on his or her inability to perform the essential functions of the job due to some physical or mental impairment, however minor), the EEOC regulations specifically provide that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 CFR §1630.2(j)(3)(i). Rather, an individual must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." Id.

In a 1997 decision on this issue, the Ninth Circuit ruled that a nurse whose neck injury resulted in her permanent restriction from lifting more than 25 pounds on a regular basis was not disabled because, although barred from providing "total patient care" as a nurse, the lifting restriction did not significantly restrict her from engaging in an entire class of jobs. Thompson v. Holy Family, 121 F.3d 537 (9th Cir. 1997).

In contrast, however, a Southern District of New York trial court judge recently ruled that the practice of law is not just a single job but a class or broad range of jobs. Bartlett v. New York State Bd. of Law Examiners, 970 F. Supp. 1094 (S.D.N.Y. 1997) (holding that a dyslexic applicant for the state bar exam was entitled to reasonable test-taking accommodation). Aff'd on other grounds 1998 WL 611 730 (2d Cir. 1998).

Another hotly contested issue as to what qualifies as a disability is whether an impairment should be considered in its treated or untreated state. The EEOC in a non-binding Interpretive Guidance takes the position that an impairment should be considered without taking into account any ameliorative measures. 29 CFR 1630, App. §§1630.2(h).

The federal circuits, however, have split on the question of whether a medical condition such as diabetes - which, if treated with regular medication, does not substantially limit major life activities - constitutes a disability under the Act. See, e.g., Arnold v. United Parcel Service, 136 F.3d 854 (1st Cir. 1998) (refusing to consider corrective measures in determining whether a diabetic is a disabled individual under the ADA); but cf. Sutton v. United Airlines, 130 F.3d 893

(10th Cir. 1997) (ruling that poor eyesight is not a disability under the ADA when, through use of corrective measures such as glasses and contact lenses, vision falls within normal range).

In a 5-4 decision, the United States Supreme Court ruled this summer that an asymptomatic individual who tests positive for the HIV virus should be considered disabled for the purposes of the ADA. Bragdon v. Abbott, 98 Daily Journal D.A.R. 6973 (1998).

In Bragdon, a dentist refused to treat an asymptomatic HIV-infected patient in his office, instead requiring her to go to a hospital to have a cavity filled, on the ground that the hospital had more appropriate infection control facilities. The patient later filed suit under the ADA, and the First Circuit affirmed summary judgment against the dentist.

The Supreme Court held that the patient was disabled under the ADA because HIV infection, regardless of a patient's outward symptoms, is a physical impairment that substantially impairs the major life activity of reproduction. The court's ruling that reproducing and bearing children is a major life activity resolved a question previously debated by several lower courts. In so ruling, the court rejected the doctor's argument that Congress intended the ADA to cover activities with a "public, economic, or daily character," reasoning that "reproduction and the sexual dynamics surrounding it are central to the life process itself." The court further pointed out that the CFRs include non-public, non-economic activities, such as "caring for one's self" and "performing manual tasks," as major life activities.

The court further rejected the doctor's assertion that his professional judgment regarding the risk presented by treating the patient in his office should receive special deference. The court did, however, remand the case to the First Circuit to determine whether, in light of the evidence presented, no issue of fact existed as to whether the doctor's assessment of the risk was objectively reasonable based on the information available at the time.

In addition to the ADA, California practitioners dealing with disability issues also should be aware of the California Fair Employment and Housing Act ("FEHA"), California Government Code §§12900 et. seq.

This statute prohibits discrimination on the basis of "physical disability," "mental disability," and "medical condition" and reaches smaller employers (of five employees or more) not subject to the ADA. (Its provisions relating to individuals with a mental disability, however, apply only to employers of 15 or more employees. Cal. Gov't. Code §12926 (d) (2)).

Although FEHA and the ADA are similar and California courts generally look to the ADA in interpreting its state counterpart, there has been a recent split among the California Courts of Appeal as to whether a mental impairment must, like a physical impairment, substantially limit an individual's life activities. In Pensinger v. Bowsmith, 60 Cal. App. 4th 709 (1998), the Fifth Appellate District strictly interpreted the statute as not imposing this requirement. The Fourth Appellate District, however, reached a contrary conclusion in Muller v. Automobile Club of Southern California, 61 Cal. App. 4th 431 (1998).

As seen by these cases, this area of the law is of particular interest, both as social policy potentially enabling many individuals to remain in the workforce and lead socially productive lives, and as one of the more hotly litigated areas of employment law. Practitioners should watch their advance sheets as the courts resolve these and other pending issues.

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Test — Elimination of Bias
1 Hour MCLE Credit

This test will earn 1 hour of MCLE credit in Elimination of Bias.

1. True/False. The Americans with Disabilities Act ("ADA" or the "Act") applies only to employment issues.

2. True/False. The ADA applies only to federally funded entities.

3. True/False. The Rehabilitation Act was enacted subsequent to the ADA.

4. True/False. Entities subject to the ADA include employers, unions, and employment agencies.

5. True/False. In order to be covered by the ADA, an employer must employ at least 15 employees.

6. True/False. An employer of less than 15 employees is not subject to any disability discrimination laws.

7. True/False. The ADA requires employers to reasonably accommodate all physical and mental conditions.

8. True/False. Pyromania is a physical or mental impairment covered by the ADA.

9. True/False. Learning disabilities may be a physical or mental impairment covered by the ADA.

10. True/False. For an impairment to constitute a disability under the ADA, the impaired individual must be slightly limited from engaging in a major life activity.

11. Major life activities include:

    a. Caring for oneself
    b. Breathing
    c. Working
    d. All of the above

12. True/False. In order to constitute a "major life activity," the activity must have a public, economic or daily character.

13. True/False. One of the factors used in determining whether an impairment is a disability is whether the impairment is permanent or long-term.

14. True/False. An individual is disabled under the ADA if he or she is unable to perform a single, particular job due to a physical or mental impairment.

15. True/False. A lifting restriction of 25 pounds is a disability under the ADA.

16. True/False. An HIV-infected person who has no outward symptoms of AIDS is not considered disabled under the ADA.

17. The California Fair Employment and Housing Act ("FEHA") prohibits discrimination on the basis of:

    a. "Physical disability"
    b. "Mental disability"
    c. "Medical condition"
    d. None of the above
    e. All of the above

18. True/False. California courts generally look to the ADA in interpreting FEHA.

19. True/False. California courts agree that, under FEHA, a mental impairment need not substantially limit an individual's life activities.

20. True/False. The law in the area of disability discrimination is well-settled.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour, of which one hour will apply to elimination of bias.

- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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